STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 94-002

COMCRAFT INC. CONTRACT WITH CITY OF LOS ANGELES

I.

INTRODUCTION AND PROCEDURAL HISTORY

This case concerns telephone installation and maintenance services performed pursuant to a contract between Comcraft Inc. and the City of Los Angeles. The contract was in effect from 1988 through April 30, 1994. Throughout the relevant period, Comcraft employees were employed under the terms of a collective bargaining agreement between the company and the Communications Workers of America ("CWA").

The City initially advised Comcraft that payment of prevailing wages to Comcraft employees providing services to the City was not required. The contract between the City and Comcraft did not require payment of prevailing wages.[1] During the period between November 1992 and September 1993, ten Comcraft employees asked the City to require Comcraft to pay prevailing wages to the Comcraft employees for services they performed.

In July of 1993, the City first sought and received information from this Department regarding application of the

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[1] As discussed below, a subsequent contract between the City and Comcraft, which commenced on May 1, 1994, did require payment of prevailing wages.

state's prevailing wage laws. The Department advised the City by letter that some of the services performed pursuant to the contract appeared to be within the scope of "public works" within the meaning of the Labor Code.

The first employee request to this Department for enforcement of the prevailing wage laws was made in October 1993. Correspondence among counsel for Comcraft, the City, this Department, and the CWA representative took place during the period between November 1993 and May 1994. The Director's letter regarding public works coverage of the services provided to the city pursuant to the contract was issued July 26, 1994. Comcraft submitted an appeal of this coverage determination by letter dated August 10, 1994. The City of Los Angeles submitted an appeal by letter dated August 16, 1994. CWA appealed the determination by letter dated August 25, 1994.

II.

ISSUES TO BE DECIDED

Contentions on Appeal

The City of Los Angeles contends the director's coverage determination was incorrect in that:

1. None of the services provided by Comcraft employees are within the statutory definition of public works, but rather are the kinds of telephone installation services that are not covered by the public works laws.

2. The services provided are not "maintenance" within the meaning of Labor Code section 1771, because the telephone system at issue is owned by the City acting in a proprietary capacity,

not as a governmental entity, and the system is thus not a "public utility."

3. The letter to the City from Maria Robbins of this Department's Division of Labor Statistics and Research ("DLSR") dated July 16, 1993 did not take account of the fact that some of the work performed pursuant to the contract might fall within the definition of public works while other work performed under the contract did not fall within that definition. Therefore, the July 16, 1993 letter was not a definitive statement on application of the prevailing wage laws to the contract.

4. Because the contract expired on March 30, 1994,[2] more than 90 days prior to the issuance of the coverage determination letter, the statute of limitations has run on enforcement of the prevailing wage requirements.

Comcraft Inc. argues the Director's decision was incorrect in that:

1. Comcraft was originally advised by the City that the work to be covered by its contract with the City was not covered by prevailing wage laws, and Ms. Robbins' July 16, 1993 letter to the City of Los Angeles was not also provided to Comcraft; therefore, enforcement of the prevailing wage laws for the period after July 16, 1993 is "inappropriate."

2. Because of (1) the practical difficulties in determining which work performed during the period of the contract is within and without the definition of "public works"; and, (2) the failure

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[2] Counsel for the City has acknowledged since submitting the initial appeal that the contract expired on April 30, 1994, rather than March 30, 1994, as stated in its appeal letter.

of the City to notify Comcraft that payment of prevailing wages would be required for some work but not for other work, payment of any additional wages due should be paid by the City, not by Comcraft.

3. Application of the California prevailing wage laws is pre-empted by the Employee Retirement Income Security Act ("ERISA") (29 U.S.C. 1001 et. seq.)

4. Application of the California prevailing wage laws is pre-empted by the National Labor Relations Act ("NLRA").

CWA appeals the determination "to the extent that it limits backpay due and owing certain employees." CWA contends:

1. There is no authority for limiting backpay once it is determined that the work performed by the employees is a public works, and that the Department should enforce prevailing wage obligations for the entire period of the subject contract.

Conclusions on Appeal

1. Some of the work performed pursuant to the contract is subject to the prevailing wage requirements, while other work is not. Questions concerning which specific tasks are covered by the prevailing wage laws and which are not need not be decided herein.

2. Maintenance work on the City telephone system is within the statutory definition of "maintenance."

3. The failure of the City to require payment of prevailing wages from the inception of the contract does not preclude enforcement of California prevailing wage laws. However, because of the unique and complex facts of this case, the initial determination will not be applied retrospectively.

4. Enforcement of the California prevailing wage laws is not pre-empted by ERISA.

5. Enforcement of the California prevailing wage laws is not pre-empted by the NLRA.

III.

FACTS

Comcraft Inc. entered into a contract with the City of Los Angeles for telephone installation, maintenance and repair for the period beginning September 1, 1988 and ending August 31, 1989. The contract was extended on a monthly basis on a number of occasions, expiring finally on April 30, 1994. Comcraft and the City entered into a new contract covering the same range of work - telephone installation, maintenance and repair - on May 1, 1994.

The contracts call for a variety of services as requested from time to time by the City. Those services consist of the installation of several different kinds of telephones and other related equipment, as well as maintenance and repair work. The telephones to be installed include a single telephone line, a six-button telephone, a ten-button telephone, a 20-button telephone, "intercommunication units" and "key service units." The contract also calls for installation of cable, of "power supply" and wiring, as well as hook-ups of telephones, where cables are already in place. Finally, the contract indicates that maintenance and repair work is to be performed on the telephone system, without further description.

The Comcraft employees assigned to perform services under this contract were and are employed by Comcraft pursuant

to a collective bargaining agreement with the CWA. This collective bargaining agreement calls for the employer to make contributions to various employee benefit funds on behalf of the employees who work under the contract.

The City is a charter city under the laws of the State of California, and therefore has the authority to exempt itself from the state's prevailing wage laws, by passage of legislation on the subject. However, section 425 of the City Charter provides that the state's prevailing wage law is "hereby accepted and made applicable to the City of Los Angeles ...."

When the City and Comcraft entered into their service agreement in 1988, the contract did not require payment of "prevailing wages" for work performed under the contract. Comcraft has asserted, and the City has not denied, that Comcraft was given oral assurances at various times by city officials that the work to be performed by the contract was not covered by the city's "prevailing wage" requirements. However, in December of 1992, a Labor Compliance Officer of the City's Bureau of Contract Administration advised Comcraft that he believed the work performed by Comcraft employees <u>was</u> covered by the prevailing wage law requirements. After that statement by the Labor Compliance Officer, however, the general manager of the Department of General Services, Randall Bacon, confirmed the sequence of events described by Comcraft's counsel, in which Comcraft had been advised that prevailing wage laws did not apply to the telephone installation work. However, Mr. Bacon's letter did not state the City's position on whether the prevailing wage laws were

applicable to the services being provided under the contract.

On July 13, 1993, Manny Perez, Labor Compliance Officer for the City, wrote to Maria Y. Robbins, Deputy Chief, DLSR, inquiring as to whether work performed pursuant to the Comcraft contract was covered by the state's prevailing wage laws. Ms. Robbins wrote to Mr. Perez on July 16, 1993 stating:

> Based on a review of the information and facts provided in this case, as you have presented them, the installation of telephone cables and associated telephone equipment (jacks and connectors) is public works within the meaning of the Labor Code.

Ms. Robbins noted in her letter that DLSR had published a prevailing wage determination for a Telephone Installation Worker since 1989. A copy of that determination was enclosed with her letter.

The original master contract remained in effect, through a series of extensions, until April 30, 1994. A new contract, which required payment of prevailing wages, commenced on May 1, 1994. (Letter from Marcia Haber Kamine, dated August 24, 1994). On October 11, 1994, this contract was amended to provide that it would terminate no later than December 31, 1994. The contract did terminate on that date, and Comcraft closed its corporate offices in Northridge and moved to Grants Pass, Oregon. (Letter from Lawrence S. Grosberg, dated May 24, 1995.)

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IV.

DISCUSSION

A. It is unnecessary to this decision to distinguish the specific tasks that are subject to prevailing wages from those that are not.

In a number of previous coverage determinations, this Department has concluded that some telephone equipment and system installation work is within the definition of "public works" while other such work is not within the definition of public works. The installation of telephone equipment which consists of the installation of cables, new wiring, switching equipment, or building renovation designed to allow the installation of such equipment, and similar work, has been held to be within the meaning of "alteration" or "construction" under Labor Code section 1720.[3] The assembly and installation of a purchased product, if no other work is required, is not "alteration" or "construction" within the meaning of Labor Code section 1720.[4]

The 1988-1994 contract between Comcraft and the City calls for Comcraft to provide a variety of services for the City. The contract calls for the performance of seemingly uncomplicated as well as complex tasks. The July 26 coverage determination letter issued by the Director acknowledged that some of the work that has been performed by Comcraft employees is covered by the public

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[3] See, e.g., Riverside County Telecommunication System, (May 20, 1988).

[4] See, e.g. PWCD #93-026, Queing Systems, Department of Motor Vehicles, [July 20, 1993]. This approach is consistent with the Department's determinations with respect to installation of other equipment and systems. See, e.g. H.R. Chubb and Associates (Dec. 31, 1990) (installation of food service equipment); BCR Incorporated (April 25, 1991) (installation of toilet partitions, accessories and lockers); Scotts Valley Floor Covering Inc. (Dec. 5, 1990) (installation of window blinds).

works laws, while other work is not:

> [I]t is my conclusion that to the extent that the work performed by Comcraft Inc. employees for the City of Los Angeles consisted of installation of cables, wiring, junction boxes or switching equipment, or building renovation...the work amounted to public works within the meaning of Labor Code section 1720. Installation of telephone equipment which consisted of nothing more than the assembly and installation of a purchased product is not included within the definition of "alteration" or "construction" and is therefore not covered by the prevailing wage laws.

The initial determination cited a prior one[5] which concluded that the following tasks were more substantial than the mere assembly and installation of a purchased product, and therefore fell within the definition of "public works": "(1) replacement of existing wiring and installation [of] new wiring; (2) installation of termination points; (3) installation of jacks and relocation of existing jacks; (4) running cables between building[s] whether in existing trenches, new trenches, or overhead; (5) installation of switching equipment." The City contends in its appeal that the services rendered by Comcraft did not include the placing of switching equipment, building renovation or installing of cable trays. If, in fact, Comcraft employees did not do any of the tasks previously determined to be covered, prevailing wages would not be required. The Division of Labor Standards Enforcement ("DLSE") would normally determine which specific tasks are subject to prevailing wages. In this case, moreover, because the initial determination is not being applied retrospectively, it is unnecessary resolve such questions here.

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[5] Installation of Riverside County Telecommunications System (May 20, 1988).

B. To the extent the City's contract with Comcraft calls for the provision of maintenance or repair services, those services must be paid for at the applicable prevailing wage rate.

Labor Code sections 1720(a) and 1771 specifically provide that the general prevailing wage rate must be paid for services performed pursuant to a contract let for repair and/or maintenance work. The City's contract with Comcraft on its face calls for "telephone installation maintenance and repair, as per attached specifications." The contract includes a specific hourly rate to be charged by the company "to perform repair and maintenance." DIR Regulation 16000 (2 California Code of Regulations 16000) includes a definition of "maintenance" as:

> Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purpose....

The most logical and reasonable understanding of this definition, specifically the reference to "utility system," is that "maintenance" is defined to include such work on utilities used by public entities in their day-to-day operation - electrical systems, plumbing and heating systems, telephone systems and the like. The City argues that its telephone system is "privately" owned, and is therefore not public, because the City is acting in a proprietary capacity, and not as a governmental entity. The City offers no legal support for this argument in its appeal letter. The contention is not persuasive. When a public entity awards a contract for construction, alteration, demolition, repair or maintenance work on a facility it owns it is, ipso facto,

acting in a proprietary capacity. The Labor Code's prevailing wage requirements expressly apply to precisely these situations. Here, although the telephones are not available for use for outgoing calls by members of the general public, the telephone system is a utility system that is owned by a public entity and is used by that public entity in its everyday operations. Work done to maintain the telephone system is therefore within the meaning of "maintenance" in Labor Code section 1771.

C. ERISA does not pre-empt enforcement of the California prevailing wage laws.

ERISA pre-empts "any and all state laws insofar as they ... relate to any employee benefit plan ..." 29 U.S.C. section 1144(a).

The prevailing wage laws require payment of wages at specified levels, which vary from one job classification to another, and which also vary depending on the locality of employment. To the extent an employer wishes to contribute to employee benefit plans, 8 California Code of Regulations sections 16200(a)(3)(I) refers to payment of additional wages in circumstances in which the actual payments made by the employer on behalf of employees, for benefit payments, are less than the aggregate amount set out as prevailing in the wage determinations:

> In the event the total of Employer Payments by a contractor for the fringe benefits listed as prevailing is less than the aggregate amount set out as prevailing in the wage determination, the contractor must pay the difference directly to the employee. [emphasis added].

Thus, the regulations specifically do not require payments into any fringe benefit fund.

Several Ninth Circuit decisions set out the criteria that are to be applied to determine if a state law falls within the meaning of the phrase "relate to" in the ERISA pre-emption section. In Martori Brothers Distributors v. James-Massengale, (9th Cir. 1985), 781 F.2d 1349, the Court of Appeals held that State laws are pre-empted by ERISA if they fall within one of the following four categories:

> First, laws that regulate the type of benefits or terms of ERISA plans. Second, laws that create reporting, disclosure, funding, or vesting requirements for ERISA plans. Third, laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans. Fourth, laws and common-law rules that provide remedies for misconduct growing out of the administration of the ERISA plan.

Id. at page 1357. This approach has been adopted in Local Union 598 etc. v. J. A. Jones Construction Company, 846 F.2d 1213 (9th Cir. 1988) and Aloha Airlines Inc. v. Ahue 12 F.3d 1498 (9th Cir. 1993).

The California prevailing wage laws and regulations implementing them do not affect ERISA plans, the payments required or the benefits distributed, in any of these ways. Therefore, the prevailing wage laws are not pre-empted by ERISA. This is the

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conclusion that reached by the United States District Court in two recent decisions: Associated Builders and Contractors v. Curry 797 F.Supp. 1528 (N.D. Cal. 1992), at pages 1534-1538;[6] and WSB Electric Inc. v. Curry _____ F.Supp. ____ (N.D. CA., Case No. C 90 00771 CW, August 11, 1994).[7]

Counsel for Comcraft has cited Associated Builders & Contractors v. Baca, 769 F.Supp. 1537 (N.D. Cal. 1991) for its holding that local prevailing wage requirements are pre-empted by ERISA. This Department was not a party in that case, and we believe it to be incorrectly decided; it is under appeal *sub nom* Chamber of Commerce v. Bragdon, 9th Cir. Nos. 91-16397 and 91-16399.[8]

A series of Supreme Court and Ninth Circuit decisions have held that state regulatory laws are not pre-empted by ERISA simply because of their possible economic effect on ERISA plans. Among these decisions are Mackey v. Lanier Collections Agency and Service Inc. 486 U.S. 825, 108 S.Ct. 2182 (1988); Retirement Fund Trust of the Plumbing etc. v. Franchise Tax Board, 909 F.2d 1266 (9th Cir. 1990); and, most recently, Employee Staffing Services v. Aubry, 20 F.3d 1038 (9th Cir. 1994).

Among the other cases cited by counsel for Comcraft, both

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[6] That decision is pending on appeal with the Ninth Circuit.

[7] A copy of this recent decision is enclosed

[8] The Ninth Circuit did recently hold that ERISA pre-empts the operation of Labor Code § 1777.5 to allow the payment of less than prevailing wages to apprentices in ERISA apprenticeship programs. Dillingham Construction v. County of Sonoma (June 7, 1995) ___ F.3d ___. However, Dillingham does not suggest that prevailing wage requirements themselves are pre-empted. Other circuits have held that prevailing wage laws are not pre-empted by ERISA. Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Department of Labor and Industry (8th Cir.1995) 47 F.3d 975; Keystone Chapter, Associated Builders and Contractors, Inc. v. Foley (3d Cir.1994) 37 F.3d 945

Shaw v. Delta Airlines 463 U.S. 85 (1983) (at p. 98, n. 17) and General Electric v. New York State Department of Labor 936 F.2d 1448 (at pp. 1460-1461) uphold the validity of state laws requiring payment of wages at specified levels, although each decision finds ERISA pre-emption of other aspects of the state legislation involved.

D. The National Labor Relations Act does not pre-empt enforcement of the California prevailing wage laws.

Metropolitan Life Insurance Company v. Massachusetts, 471 U.S. 724 (1985) upheld the validity of a state law requiring a minimum level of mental health care benefits even in health insurance plans created by collectively bargained contracts. The Supreme Court rejected the contention that because the state law may have some impact on collective bargaining - e.g. a law that might require an employer to provide benefits that it would not have agreed to in the absence of the state law - the state law was pre-empted by the NLRA.

In ABC v. Building and Construction Trades, (1993) ___ U.S._____ 113 S.Ct. 1190, the Supreme Court held that where a state is acting in a proprietary position and not in a regulatory position, that state may do anything that a private employer is authorized to do by the NLRA. That is, the state's actions in this context are not to be evaluated by the pre-emption standards set out in the many cases analyzing the extent of federal pre-emption of state labor relations regulation. Applying this approach, in Babler Brothers Inc. v. Roberts (9th Cir. 1993) 995 F.2d 911 the Court of Appeals upheld an Oregon state law that

established certain requirements for payment of time-and-a-half pay, by private contractors, for overtime work on public works; the law exempted from the requirement contractors and employees working under a union contract. The court cited Associated Builders in holding that the state law was not pre-empted inasmuch as the state in that instance was acting in its proprietary capacity (defining working conditions on work paid for by the state and its local political entities) rather than in a regulatory capacity.[9]

Our conclusion that the state's prevailing wage laws are not pre-empted by the NLRA is well-supported by these federal court decisions.

E. Because of the unique and complex circumstances surrounding this case, the initial determination will not be applied retrospectively.

1. The responsibility for enforcement of this determination is, for the reasons stated herein, properly subject to prosecutorial discretion to be exercised by DLSE.

Labor Code section 1775 relates to enforcement of the prevailing wage laws. The statutory scheme refers to the passage of 90 days after the filing of a "valid notice of completion in the office of the county recorder ...." Questions concerning the application of the statutory time limitations to the specific circumstances of this case, as well as the period for which prevailing wages must be paid, are questions of enforcement policy

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[9] See also Associated Builders v. City of Seward (9th Cir. 1992) 966 F.2d 492, in which the Court of Appeals upheld a city's decision imposing certain wage and working condition requirements on private contractors carrying out a public works project.

normally left to the DLSE.

CWA asserts in its appeal, however, that once it has been determined that the work performed by employees is determined to be "public work," there is no limitation on the period[10] for which liability for backpay may be imposed and insists that the enforcement mechanism must be utilized to collect any underpayment. The contention of CWA in this regard would essentially provide no statute of limitations on recovery of prevailing wages in the event there is no notice of completion filed and there is no "acceptance" of the work by the awarding body. The experience of DLSE, the agency usually mandated to enforce the prevailing wage, clearly indicates that CWA's interpretation of the statutory scheme is not shared by the courts in the State of California. Indeed, DLSE has never argued that there cannot be a point at which the courts should not impose a cut-off.

In addition, CWA's argument ignores the discretion that governmental agencies must exercise in enforcing laws. In Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 991, the California Supreme Court likened the role of the Director (acting through DLSE) to that of a district attorney. Prosecutorial discretion of DLSE was also explained in detail by the court

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[10] CWA, in its appeal, cites the case of Henry v. Amrol (1990) 222 Cal.App.3d Supp.1 for the proposition that unless the statute contains a limitation on the recovery of back pay, non exists. The Henry case does not specifically say that and the issue is not addressed by the court; but a reading of the award by the court would lead one to conclude that a seven-year statute of limitations was in effect. However, a more recent case, Sequeira v. Rincon-Vitova Insecretaries, Inc. (1995) 32 Cal.App.4th 632, 637, recognizes that laches may be applied even in statutory cases.

in the case of Painting & Drywall Work Preservation Fund v. Aubry (1988) 206 Cal.App.3d 682, 687. Thus, not only does the Director have the right to determine in the first instance whether the project is a public work, but may decide that the enforcement arm of the Department (DLSE) should, under the circumstances, exercise its discretion regarding enforcement.

Under the unique and complex circumstances of this case, there are compelling reasons not only to apply the initial determination prospectively only, but to exercise prosecutorial discretion in enforcement. The evidence in this case indicates that Comcraft acted in good faith reliance on the City's representations that prevailing wages were not required. Couple this reliance with the failure of the City to inform Comcraft of DIR's initial advice that the project was, at least in part, subject to the public works laws, and the fact that for a period of five or six years Comcraft executed the various contracts with the City in a reasonable belief that it was fully satisfying its legal obligations by paying its employees. During this period Comcraft was also paying rates set out in the collective bargaining agreement it had entered into with CWA.

In addition, due to delays involved in this case--delays in no small measure the result of actions by the City--far more than ninety days have expired since Comcraft completed its final contract with the City. Further, the employees were represented during the entire period of the contractual relationship between Comcraft and the City, and the union did not recognize and address the public works question.

The City, as awarding body, is mandated by the Labor Code to take cognizance of any violations of the prevailing wage law during the course of the execution of the contract. However, instead of cooperating with the Department, the City (or at least a portion of the City administration) chose to direct the contractor not to pay the prevailing wage.

The administrative difficulties which DLSE would encounter in attempting to enforce the prevailing wage would be substantial. Attempting to distinguish the activities of employees subject to the prevailing wage from those which are not would take investigative time far in excess of that which is normally utilized in prevailing wage investigations.

While none of the above circumstances, standing alone, would be sufficient to trigger the exercise of prosecutorial discretion by DLSE, the aggregate not only allows such discretion, but in fact compels its exercise.

As noted above, the City of Los Angeles, with its conflicting advice, has significantly contributed to the confused state of this situation and record. Under Labor Code sections 1726 and 1727, the awarding body (City of Los Angeles) is also entrusted with the responsibility of enforcing the prevailing wage laws. In the event that the City feels that enforcement activity is required, the DLSE is directed to provide the City with any information needed for the City's investigation or with any information on legal procedures in the event that the City's investigation reveals that there is a cause of action available to recover unpaid prevailing wages. In any such proceeding, Comcraft

could bring forward its claim, which appears well grounded in part, that the City should pay, in whole or in part, any wages due.

V.

CONCLUSION

The coverage determination set out in the Director's letter of July 26, 1994 is hereby affirmed, except as modified herein.

Date: 7/21/95

Lloyd W. Aubry, Jr., Director
Department of Industrial Relations